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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN MIGUEL PEREZ, Defendant and Appellant.	F059479 (Super. Ct. No. 09CM2129) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. James T. LaPorte, Judge.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jesse Witt, for Plaintiff and Respondent.

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Appellant Juan Miguel Perez appeals from his conviction for making a criminal threat (Pen. Code, § 422),[1] and from his conviction and sentence for committing a lewd and lascivious act on a child under the age of 14 (lewd conduct) (§ 288, subd. (a)). He contends the trial court erred in: 1) failing to instruct the jury generally that the criminal threat charge was a specific intent crime; 2) failing to provide a unanimity instruction to the jury with respect to the lewd conduct charge; and 3) failing to stay the sentence for the lewd conduct conviction pursuant to section 654. We will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant lived with his wife, Maria, and their three children: daughter, A.P., age nine at the time of the incidents, an older son, J.P., and a younger daughter, O.P. Beginning February 28, 2009, appellant was left to take care of A.P. and J.P. while Maria tended to O.P., who was hospitalized for two weeks. They lived in Ivanhoe, near Visalia, at that time. It was during those two weeks that appellant first attempted to touch A.P. inappropriately, while she was in the shower. Over the next three months, there were three separate incidents, in different locations, where A.P. testified appellant put his penis "inside [her] butt," and a fourth incident where appellant attempted to do so, but stopped when J.P. walked into the room. On two of those occasions, A.P. testified appellant also attempted to put his penis in her mouth, but she turned away each time.

In early June that same year, the family moved to Hanford. While they were in the process of moving into the new house, Maria went to the store. A.P. testified appellant pulled her into the garage, leaned her over a television set, and attempted to put his penis inside "[her] butt." When appellant heard something in the driveway, however, he stopped, and then A.P. felt something hot on her back, "which felt like pee." On another occasion, A.P. was in her bedroom at night. When appellant came in, A.P. pretended to

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

be asleep. A.P. testified appellant "was trying to put [his penis] in [her butt] but he couldn't do it."

On the evening of June 28, 2009, A.P. and appellant were watching television in the living room while Maria was in the shower. A.P. testified she was lying on the couch when appellant approached her, touched her breasts under her clothes, pulled down her pants, put his finger inside her vagina, and kissed her on the mouth. Appellant also sucked on her breasts, leaving red marks. Appellant then took his erect penis out of his pants, put it against A.P.'s lips, and told her to suck it. It was then that Maria walked into the living room and saw what was taking place.

Maria became upset, pushed appellant to the side, and began hitting him. She then ran to the phone and told him she was going to call the police. Maria testified appellant took the phone from her and told her that if she called the police he was "going out to the garage to get the pistol that he had there and he was going to kill [her]." Appellant then proceeded to the garage. Maria locked herself and the children into a bedroom, but appellant returned and kicked the door down. Maria was asking A.P. if anything similar had happened to her and A.P. told her appellant had hurt her many times. Appellant again threatened to kill Maria. Maria told appellant if he left, she would not call the police. She threw some keys at him, which he took and left. Maria locked herself and the children in a room and tried calling the police, but could not call out. She stayed up all night, and then in the morning checked the phone line and found it disconnected. She reconnected the line and called the police. She also later discovered the gun was missing from the garage.

Officer Ernesto Servin responded to Maria's call and proceeded to the house, where he questioned A.P. to discern whether probable cause existed for him to make an arrest. In describing the incident of the night before, A.P. told Officer Servin appellant had opened his pants zipper and put his penis on her lips. Officer Servin testified A.P. also told him that the previous week she woke early in the morning with appellant's penis

in her mouth; and that two to three weeks prior appellant had grabbed her in the garage, pushed her against the television, pulled her pants down, and then she felt something first "in her butt and then felt something in her anus that caused her pain." A.P. told Officer Servin she could recall other incidents, but had no specific dates.

While Officer Servin was at the house, appellant called Maria on her cell phone. Officer Servin talked to appellant over the phone, and testified that appellant told him he believed he did nothing wrong "because all he did was put his penis to her lips but he was never able to put it in her mouth." Officer Servin convinced appellant to meet him at the house. Appellant drove there, whereupon Officer Servin handcuffed him and put him in his patrol car. He then searched appellant's vehicle and found a .22-caliber handgun and ammunition.

Officer Servin interviewed appellant at the police station and testified as to appellant's description of the prior evening's events. "[Appellant] felt like putting his penis in [A.P.'s] mouth so he stood up and approached her. As soon as he put his penis on her lips she clinched her jaw and turned around. He went ahead and grabbed her head with his left arm and tried again, that's when [Maria] came out of the restroom." Officer Servin also testified appellant described to him an incident the week prior where appellant had put his penis in A.P.'s mouth while she was sleeping, and another incident approximately two weeks prior, in the garage, where he leaned her against the television set, pulled her pants down, and "began rubbing her with his penis and after a while he allowed [A.P.] to leave and he began masturbating," ejaculating after she left. Appellant also admitted to Officer Servin that the gun was not registered to him, that he disconnected the phone line to get Maria to listen to him before calling the police, and that he threatened to kill Maria. Appellant explained to Officer Servin he threatened Maria to "try to get her to listen to what he had to say."

Appellant was charged with the following nine counts of unlawful conduct: 1) oral copulation (§ 288.7, subd. (b)); 2) sodomy (§ 288.7, subd. (a)); 3) sexual intercourse (§

288.7, subd. (a)); 4) sexual penetration (§ 288.7, subd. (b)); 5) committing a lewd and lascivious act (§ 288, subd. (a)); 6) continuous sexual abuse of a child (§ 288.5, subd. (a)); 7) making a criminal threat (§ 422); 8) malicious obstruction to a telephone line (§ 591); and 9) carrying a concealed weapon in a vehicle (§ 12025, subd. (a)(1)).

At trial, A.P. also testified appellant had put his penis in her vagina when they were living in Ivanhoe, but she could not recall the location, timeframe it occurred in, or any details.

A forensic nurse examined A.P. for signs of sexual assault the day after the last incident. The nurse found evidence of bruising in the back of A.P.'s mouth consistent with oral copulation. She testified such bruising would typically heal in about a week. She also found evidence of suction injuries to A.P.'s breasts. The nurse found no evidence of vaginal assault or injury to A.P.'s rectal area, but could neither confirm nor deny penetration based on the lack of evidence.

Appellant chose not to testify. The jury deliberated for approximately one and a half hours before returning guilty verdicts on all counts, except count 3 (unlawful sexual intercourse). The jury made no requests for clarification nor otherwise submitted questions to the court during deliberations. The trial court sentenced appellant to 55 years to life, plus nine years and four months.

DISCUSSION

I.

Defendant first contends his conviction on count 7 for making a criminal threat must be reversed because the trial court erred in instructing the jury that count 7 was a general intent crime. Respondent concedes the error, but contends it was not prejudicial and does not require reversal. We agree.

The trial court instructed the jury generally on intent using CALCRIM No. 225[2] and CALCRIM No. 252.[3] CALCRIM No. 225 informed the jury of the intent requirement generally, and noted that the instruction for each crime would explain the required intent for that particular crime. CALCRIM No. 252 separately listed the general intent crimes and the specific intent crimes. Included in the list of general intent crimes was count 7, criminal threats. The count was omitted from the list of specific intent crimes that immediately followed the list of general intent crimes. After following CALCRIM No. 252 with several general instructions on evidence and evaluating witness testimony, the court proceeded to instruct the jury on the specific offenses, including going over CALCRIM No. 1300, which listed the specific elements to prove a criminal threat. The third element stated the People must prove specific intent, that "[t]he defendant intended that his statement be understood as a threat and intended that it be communicated to [Maria.]"

In its closing argument, the prosecution specifically stated that each element in the instructions had to be proved for a guilty finding. He discussed each count individually,

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[2] CALCRIM No. 225, as given to the jury, states in pertinent part: "The People must prove not only that the defendant did the acts charged, but also that he acted with a particular intent. The instruction for each crime and allegation explains the intent required. [¶] An intent may be proved by circumstantial evidence…."

[3] CALCRIM No. 252, as given to the jury, states in pertinent part: "The crimes … charged in Counts 1-9 require proof of the union, or joint operation, of act and wrongful intent. [¶] The following crimes … require general criminal intent: … Criminal threats as alleged in Count 7; …. For you to find a person guilty of these crimes … that person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act on purpose, however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime …. [¶] The following crimes … require a specific intent …. For you to find a person guilty of these crimes … that person must not only intentionally commit the prohibited act, but must do so with a specific intent. The act and the specific intent required are explained in the instruction for that crime …."

pointing out what evidence corresponded to each count. In discussing count 7, he followed this pattern, and with respect to the specific intent element, explained, "that the defendant intended that his statement be understood as a threat and intended that it be communicated to [Maria]. Certainly he intended it be taken as a threat and you can tell that by the fact that he grabbed a gun and had a gun with him." The prosecutor made no mention of general intent in going over the criminal threat elements, instead touching on the elements as set forth in the instruction. Defense counsel also briefly discussed the criminal threat charge, reiterating appellant's admission that he threatened Maria, but arguing, "he didn't have the intent to kill her, he just wanted to talk with her and not to get the police involved because these are serious accusations."

A. Harmless Error

The failure to instruct as to the specific intent nature of the criminal threat crime requires reversal unless we are able to conclude the error was harmless beyond a reasonable doubt. (See *People v. Harris* (1994) 9 Cal.4th 407, 416 (*Harris*); *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) Pursuant to that standard of review, we look to the evidence considered by appellant's jury under the instructions given, and inquire whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on evidence establishing the requisite elements of the crime independently of the force of the misinstruction. (*People v. Beck* (2005) 126 Cal.App.4th 518, 524; *Harris*, *supra*, 9 Cal.4th at pp. 426-427.)

General intent is the intent to do a proscribed act. (*People v. Hood* (1969) 1 Cal.3d 444, 456-457.) Specific intent is the intent to do some further act, achieve some additional consequence, or achieve a particular result. (*Id.* at p. 457.) The jury may infer from a defendant's acts that the defendant acted with the requisite intent, if such an inference is warranted by the evidence. (*Id.* at p. 458, fn. 7.) Here, to be guilty of making a criminal threat, appellant had to have the specific intent that Maria understand

his statement to her to be a threat. (§ 422.) The evidence that appellant so intended is substantial.

Appellant first threatened Maria immediately after she had picked up the phone in her first attempt to call the police after walking in on her husband sexually molesting her daughter. Appellant knew Maria was upset at him. He admitted he threatened to kill her with a gun he kept in the garage and which he knew Maria knew he had. He left Maria to retrieve the gun from the garage. Maria locked herself and the children in a bedroom, but appellant kicked down the locked door and again threatened Maria's life after hearing his daughter admit he had hurt her on multiple prior occasions. Maria agreed to refrain from calling the police if appellant would leave. It was only then that appellant did leave.

In evaluating the force of the jury instruction error, we make a determination based on the "'…entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) We presume jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.) Furthermore, "jury instructions of a specific nature control over instructions containing general provisions. [Citation.]" (*People v. Stewart* (1983) 145 Cal.App.3d 967, 975.) In addition to the more general instructions set forth in CALCRIM No. 225 and No. 252, the trial court also provided the specific offense instruction for criminal threats, CALCRIM No. 1300. The prosecution emphasized in his closing argument that the jury needed to find each element of each offense. He then went through each of the charges. He argued appellant's specific intent that Maria take the threat seriously was evidenced by appellant's action in going to retrieve the gun. The defense argued appellant did not have the specific intent to kill Maria, but only that he intended to prevent Maria from calling the police. This was a misstatement of the law, as section 422 specifically states a defendant need not have the intent to actually carry out the threat, but this argument did again impress upon the jury the concept that the law

required appellant to have a specific intent with respect to the criminal threat charge. Thus, the force of the misinstruction was mitigated by the more specific instruction as to the offense, and the prosecution's explanation as to the specific intent required for the criminal threat charge.

The jury made no further inquiry into any of the jury instructions and no evidence indicates the jury was confused about the specific intent finding they needed to make with respect to the criminal threat charge. They deliberated for only one and a half hours on nine counts. Furthermore, the jury verdict form stated explicitly that the finding of guilt for count 7 encompassed a finding that appellant had the specific intent Maria take his statement as a threat, further putting the jury on notice of the specific intent requirement.[4]

If the jury had been properly instructed that making a criminal threat is a specific intent crime, there is no doubt they would still have found appellant guilty. As respondent points out, Maria would have only agreed not to call the police if she believed appellant was serious about his threat, and appellant thus must have intended Maria take his threat seriously in order to achieve the intended result. Appellant argues that he only intended to achieve an external result from the victim -- that is, for Maria to refrain from calling the police -- and he had no intent for her to take his statement as a threat. However, the means he freely admitted to utilizing to achieve his desired result was to make a statement that he must have intended Maria to believe to be true in order for her to react by refraining from calling the police. Maria, outraged at what she had just witnessed, would certainly have only refrained from calling the police if she believed

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[4] The jury verdict form stated, in pertinent part: "We, the Jury, find the defendant, JUAN MIGUEL PEREZ, **GUILTY OF** threatening to commit a crime which would result in death or great bodily injury to [Maria], with the specific intent that the statement be taken as a threat, a violation of Section 422 of the Penal Code of the State of California, as charged in Count 7 of the Information."

appellant intended to carry out his threat. In other words, if, as appellant admits, he intended for Maria to stop calling the police, this result from her could only arise if she held the belief that appellant was serious about his threat, and therefore appellant must have intended Maria take the threat seriously in order to achieve his desired result. The force of the evidence underlying the jury's verdict outweighs the effect of the misinstruction. It is beyond a reasonable doubt the error is harmless.

II.

Defendant next argues the trial court prejudicially erred in failing to instruct the jury on the requirement of unanimity for the lewd conduct charge (count 5). He asserts the prosecution presented evidence of multiple acts of lewd conduct, and contends the jurors could have disagreed about which act defendant committed, if any, that supported the charge. Respondent acknowledges the court should have given a unanimity instruction, but argues any error in failing to do so was harmless beyond a reasonable doubt. We agree.

"When a defendant is charged with a single criminal act but the evidence reveals more than one such act, the prosecution must either select the particular act upon which it relies to prove the charge or instruct the jury that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act. [Citations.]" (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499 (*Brown*).) Where no election is made, the court has a sua sponte duty to instruct on the unanimity requirement.[5] (*People*

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[5] In addition to the one count of performing a lewd and lascivious act on a child under age 14 (count 5), appellant was charged with oral copulation, sodomy, sexual intercourse, and sexual penetration. The trial court instructed the jury with CALCRIM No. 3501, a unanimity instruction, only as to counts 1(oral copulation) and 2 (sodomy). The prosecution, in discussing the various counts in his closing argument, noted the application of the unanimity instruction with respect to the oral copulation and the sodomy charges, further explaining to the jury, "[w]hat you have to do is decide that at least you all agree that at least one of those are true and that you all agree that the same one was true." The prosecution otherwise failed to make an election as to the underlying

v. Curry (2007) 158 Cal.App.4th 766, 783.) The unanimity requirement is constitutionally rooted in the principle that a criminal defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to defendant's guilt of a specific crime. (See *Brown*, *supra*, 42 Cal.App.4th at 1499-1500; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) We thus evaluate any error in failing to provide a unanimity instruction under the *Chapman* standard of harmless error beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.) Harmless error may be found with respect to a failure to provide a unanimity instruction where the record indicates the jury resolved the basic credibility dispute against the defendant and would have convicted the defendant of any of the various offenses shown by the evidence to have been committed. (See *People v. Jones* (1990) 51 Cal.3d 294, 307.)

To prove appellant's guilt of a violation of section 288, subdivision (a), the prosecution had to establish three elements: 1) he willfully touched any part of a child's body either on the bare skin or through clothing; 2) he committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child; and 3) the child was under the age of 14 at the time. (§ 288, subd. (a); CALCRIM No. 1110.) A.P. testified about a series of occurrences meeting these elements. Her testimony was corroborated by medical evidence, testimony from Officer Servin and her mother, and appellant's own admissions.

Appellant's only real defense was his credibility. He did not testify in his own defense, but defense counsel argued that A.P. and Maria conspired to fabricate their testimony, that A.P. lied and lacked emotion in testifying, and that A.P. was motivated by anger toward her father for disciplining her. In *People v. Winkle* (1988) 206 Cal.App.3d

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offense for count 5 or instruct the jury they must be unanimous as to what single act underpinned a finding of guilt on that charge. The trial court thus had a duty to so instruct the jury, as respondent concedes.

822, the victim testified about a series of occurrences without being able to pinpoint particular dates, and the victim's testimony was corroborated by medical evidence. The defendant made incriminating statements to the police that "he had not actually penetrated her vagina, but he had only rubbed his penis against her vagina." (*Id.* at p. 825.) The court found such statements rendered it highly improbable the jury believed his subsequent trial testimony. Defendant offered no alibi nor identity defense and put forth only unsubstantiated claims that it would have been difficult for him to molest the victim in certain locations she described. The court concluded the jury must have believed the victim in order to have found the defendant guilty of the allegations in the information, and found the error in not giving the unanimity instruction harmless beyond a reasonable doubt. (*Id.* at p. 830.)

Similarly here, we conclude to a certainty that the jury made a credibility determination in favor of A.P., and in the particular circumstances of this case, the result would have been the same had the jury been instructed with the unanimity instruction. The verdicts -- findings of guilt on eight of nine counts -- demonstrate the jury decided the basic credibility issue against defendant. As respondent points out, the evidence pertaining to count 3, for which the jury acquitted appellant, was substantially vaguer than the remainder of A.P.'s testimony. She could recall neither specific timeframe nor few details beyond that the act occurred in Ivanhoe. In contrast, the jury found appellant guilty of the oral copulation, sodomy, and sexual penetration counts. This indicates the jury decided in favor of A.P.'s credibility where she provided specific testimony and was corroborated by other witness testimony or physical evidence. Furthermore, the prosecution submitted to the jury the proposition that count 5 could be based on many different acts presented, but specifically drew attention to the suction injuries. The suction injuries were documented by photographs, and corroborated by the forensic nurse. They were otherwise not included in the other counts. The jury found appellant guilty of oral copulation and sodomy, which required unanimity on at least one of the

alleged occurrences for each count. By definition, the jurors unanimously agreed on at least one of the dates of occurrence on each of these two counts. This necessarily leads to the conclusion that they unanimously agreed on at least one date of occurrence for an act supporting conviction on count 5 for lewd conduct, since a jury finding of guilty on the oral copulation or sodomy counts would satisfy the lewd act element of a section 288, subdivision (a) violation. Also, the jury's finding of guilt as to a single count of sexual penetration also satisfies the lewd act element. On the record before us, appellant's commission of any of these three acts also easily meets the intent element for a section 288, subdivision (a) violation. There is no doubt that, had the jurors been properly instructed, they would have made a unanimous finding as to the specific offense underlying their guilt finding as to count 5. The failure to give the instruction was harmless beyond a reasonable doubt.

III.

Appellant's third and final contention is that the trial court erred in failing to stay his sentence for count 5 pursuant to section 654, which precludes multiple punishments for the same act.[6] He argues that since the jury made no specific finding as to the underlying offense supporting his conviction for lewd conduct, the trial court had no way of knowing whether or not the jury convicted him based on the acts that also underpinned his convictions on the other counts. He contends the trial court should have thus relied on the "rule of lenity" to give appellant the benefit of the doubt and stayed the sentence. Respondent notes the trial court made a specific factual finding at the prosecution's request that the sentence on count 5 was for a specific event separate from those underlying the other convictions. Because the trial court has the authority to make such

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[6] Section 654, subdivision (a) states in pertinent part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

factual findings, and we uphold those findings if substantial evidence in the record supports them, we affirm the judgment.

Section 654 limits punishment for multiple convictions arising out of either an act or omission, or a course of conduct, deemed to be indivisible in time where the accused had only a single principal objective. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) "The initial inquiry in any section 654 application is to ascertain the defendant's objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*Ibid.*) "[I]n determining whether Penal Code section 654 applies, the trial court is entitled to make any necessary factual findings not already made by the jury." (*People v. Centers* (1999) 73 Cal.App.4th 84, 101.) "The question of whether the defendant held multiple criminal objectives is one of fact for the trial court, and, if supported by any substantial evidence, its finding will be upheld on appeal." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.)

At sentencing, the court imposed an aggravated term of eight years for count 5, which made up the brunt of appellant's determinate sentence. Immediately after the court's pronouncement of the sentence, the prosecution asked the court to make a finding that appellant's sentence for count 5 was for "an event that is separate from the ones in Counts 1, 2, and 4." The court did so when it responded, "Yes, and if you want to make that clear, I'll make that clear." Thus, the court made a specific finding appellant held multiple criminal objectives, and was not required to stay appellant's sentence for count 5, despite the lack of a jury finding of the specific act supporting the conviction on count 5.

Substantial evidence in the record supports a finding that the verdict on count 5 was based on an act not also supporting another count, negating application of section

654. The suction injuries alone met the elements for a lewd and lascivious conduct charge, and could not form a factual basis for the oral copulation, sodomy or sexual penetration verdicts.

DISPOSITION

The judgment is affirmed.

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Franson, J.

WE CONCUR:

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Gomes, Acting P.J.

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Poochigian, J.